

**BEFORE THE DIRECTOR
DEPARTMENT OF CONSUMER AFFAIRS
FOR THE CEMETERY AND FUNERAL BUREAU
STATE OF CALIFORNIA**

In the Matter of the Accusation and Petition to
Revoke Probation Against:

**ROYAL MEMORIES FUNERAL AND
CREMATION SERVICE, INC.**

**Harold D. Cole, President
1469 Alabama Street
Vallejo, CA 94590**

Funeral Establishment License No. FD 2131

and

**ROYAL MEMORIES FUNERAL AND
CREMATION SERVICES, INC.**

**Harold D. Cole, President
1300 Clay Street, Suite 600
Oakland, CA 94612**

Funeral Establishment License No. FD 2077

and

HAROLD DWIGHT COLE

**2605 9TH Avenue, Apt. E
Oakland, CA 94606**

Funeral Director License No. FDR 2589

Respondents.

Case No.: A1 2017 393

OAH Case No. 2018080729

DECISION AND ORDER

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Director of Consumer Affairs and the Cemetery and Funeral Bureau as the Decision and Order in the above entitled matter in connection with respondents Royal Memories Funeral and Cremation Services, Inc., Funeral Establishment License Nos. FD 2077 and 2131, and Harold D. Cole, President, Funeral Director License No. FDR 2589.

This Decision shall become effective on January 15, 2019.

It is so ORDERED December 16, 2018.



RYAN MARCROFT
DEPUTY DIRECTOR, LEGAL AFFAIRS DIVISION
DEPARTMENT OF CONSUMER AFFAIRS

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Funeral Establishment License No. FD 2131

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ROYAL MEMORIES FUNERAL AND
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Funeral Establishment License No. FD 2077,

and

HAROLD DWIGHT COLE

Funeral Director License No. FDR 2589,

Respondents.

PROPOSED DECISION

Administrative Law Judge Michael C. Starkey, State of California, Office of Administrative Hearings, heard this matter on November 1, 2018, in Oakland, California.

Deputy Attorney General Jonathan D. Cooper represented complainant Lisa M. Moore, Bureau Chief, Cemetery and Funeral Bureau, Department of Consumer Affairs.

Don F. Harris, Attorney at Law, represented respondents. Respondent Harold Dwight Cole was present.

The matter was submitted for decision on November 1, 2018.

FACTUAL FINDINGS

1. On March 8, 2018, complainant Lisa M. Moore, in her official capacity as Bureau Chief of the Cemetery and Funeral Bureau, Department of Consumer Affairs (department), issued the accusation and petition to revoke probation. Complainant alleges that respondents failed to timely file either a preneed funeral trust fund audit or a declaration of non-reporting status for the years 2015 and 2016 and that such failure constitutes cause for discipline of respondents' licenses and cause to revoke the probation of respondent Cole. Respondents filed a notice of defense and this hearing followed.

2. On January 13, 2011, the bureau issued Funeral Establishment License No. FD 2077 to Royal Memories Funeral and Cremation Services, Inc. (Royal Memories), Harold D. Cole, president, for a funeral establishment in Oakland. The license was in full force and effect at all relevant times and will expire on January 31, 2019, unless renewed.

3. On May 16, 2012, the bureau issued Funeral Establishment License No. FD 2131 to respondent Royal Memories for a funeral establishment in Vallejo. The license was in full force and effect at all relevant times until it expired on May 31, 2017.

4. On August 17, 2005, the bureau issued Funeral Director License No. FDR 2589 to Harold Dwight Cole. The license was in full force and effect at all relevant times and will expire on August 31, 2019, unless renewed. Respondent Cole is the president of Royal Memories and is responsible for Royal Memories' activities as licensed funeral establishments.

Prior Disciplinary Actions

5. On October 13, 2014, in Case No. A1 2013 65, the department issued a decision and order, effective November 13, 2014, in which the funeral director license of respondent Cole and Royal Memories' License No. FD 2078 (not at issue in this matter) were revoked. However, the revocation was stayed, and the licenses were placed on probation for three years, under certain terms and conditions, including that respondent Cole obey all laws pertaining to funeral establishments and complete an ethics course within one year. That discipline was based upon findings that respondent Cole had let his funeral director's license lapse for several months and that respondent Royal Memories had moved out of its previous location in San Rafael without notifying the bureau and also held itself out as conducting a funeral establishment at an unlicensed location, and that respondent Cole is the licensed funeral director responsible for respondent Royal Memories' regulated activities.

6. On March 23, 2017, in Case No. A 2015 219, the department issued a decision and order effective March 23, 2017, in which respondent Cole's Funeral Director License No. FDR 2589 was revoked. However, the revocation was stayed and the license was put on probation for two years to give respondent Cole "a final opportunity to demonstrate to the bureau that he can comply with all regulatory requirements" The terms and conditions of the probation include that respondent Cole obey all laws pertaining to funeral

establishments ("obey all federal, state, and local laws and all rules and regulations governing the programs regulated by the department."). Also on March 23, 2017, Royal Memories' License No. FD 2078 was revoked. That discipline was based upon a finding that Royal Memories continued to hold itself out as conducting a funeral establishment at an unlicensed location. The discipline was also based upon a finding that the same misconduct violated the probation requirement that Royal Memories obey all laws pertaining to funeral establishments, that respondent Cole also violated the probation requirement that he complete an ethics course within one year, and that he falsely attested under penalty of perjury in a quarterly report that he had complied with all probation requirements.

Failure to File Required Documents Regarding Preneed Funeral Trust Funds

7. Preneed trust funds are funds held as advance payments for funeral services to be applied for such services when needed. Funeral establishments are required to (a) submit a copy of an independent certified audit of such funds to the bureau within 120 days of the close of the funds' fiscal year (Bus. & Prof. Code, § 7737.3)¹ or (b), if exempt from that filing requirement, they must file a declaration of non-reporting status with the bureau on or before May 1 of each year (§ 7746, subds. (a) & (b)). A declaration of non-reporting status must also be filed upon the transfer of ownership or the cessation of business. (*Ibid.*) If the funeral establishment is a corporation, the declaration shall be verified by its president or vice president. (§ 7746, subd. (d).)

8. David Edwards, Lead and Supervising Auditor for the bureau, testified at hearing. His duties include ensuring that the bureau's licensees comply with annual and quarterly reporting requirements. He primarily addresses issues with trust funds, which are of high importance to the bureau because they involve the safekeeping of funds invested by consumers. Edwards is familiar with the bureau's filing system and reviewed the bureau's files relevant to this matter. The bureau's recordkeeping process is reliable. To his knowledge, the bureau has never lost or misplaced mail from licensees. He searched all of the bureau's files to determine whether the bureau received preneed trust fund filings from respondents for the years 2015 or 2016. He credibly testified that the bureau did not receive such filings from respondents.

9. The bureau sent six sets of letters to respondents regarding the failure to submit preneed trust fund filings for the years 2015 and 2016. Each letter stated that the bureau's records showed that respondent Royal Memories had not submitted the requisite preneed trust fund document, cited the statutes requiring such filings, and provided a website address where the relevant instructions and forms are available. The first four letters related to the failure to file for the year 2015; the last two letters related to the failure to file for the year 2016, as follows:

¹ All statutory references are to the Business and Professions Code, unless otherwise stated.

- a) On October 19, 2016, Edwards sent a letter to all funeral directors of funeral establishments who failed to file for the 2015 year.
- b) On December 6, 2016, Edwards sent two letters entitled "SECOND NOTICE" to respondent Royal Memories, one for each for License Nos. FD 2077 and FD 2131.
- c) On February 8, 2017, Edwards sent two letters entitled "THIRD NOTICE," signed by complainant, the bureau's chief, to respondent Cole as managing funeral director of respondent Royal Memories, one for each for License Nos. FD 2077 and FD 2131.
- d) On July 14, 2017, Edwards sent two letters entitled "FINAL NOTICE," signed by complainant, to respondent Cole as managing funeral director of respondent Royal Memories, both for License Nos. FD 2077 and FD 2131.
- e) On July 14, 2017, Mona Mathews, Staff Services Management Auditor for the bureau, sent a letter to respondent Royal Memories regarding the failure to file for the 2016 year in connection with License No. FD 2077.
- f) On September 14, 2017, Edwards sent two letters entitled "SECOND NOTICE" to respondent Royal Memories, one for each for License Nos. FD 2077 and FD 2131.

10. It is undisputed that respondents failed to timely submit the requisite preneed trust fund document for the year 2015. However, respondents maintain that respondent Cole submitted declarations of non-reporting status for the years 2015 and 2016 to the bureau in February 2017. At hearing, respondents produced declarations of non-reporting status for the year 2015 for License Nos. FD 2131 and FD 2077, and a declaration of non-reporting status for the year 2016 for License No. FD 2131. Those documents include header information printed in color ink and appear to be either originals or color copies. Complainant submitted black and white copies of those documents provided to complainant by respondent's counsel, but complainant's copies also include a fourth document, which is a declaration of non-reporting status for the year 2016 for License No. FD 2077. All the documents are dated February 1, 2017, and signed by respondent Cole.

Both of the forms for the year 2015 are incomplete. The bureau's form lists several different ways by which a funeral establishment might qualify for non-reporting status, each preceded by a "check box." To complete the declaration, the funeral establishment's president or vice president must check each box that applies. On both of the forms for the year 2015, no box is checked. Nor is there any other indication of what basis was claimed to qualify for non-reporting status. Respondent Cole testified that omission was due to a mistake. On the forms for the 2016 year, respondents indicated that Royal Memories was eligible for non-reporting status because its clients purchase insurance for preneed funeral services and Royal Memories does not receive those payments.

11. Respondents submitted a copy of an envelope addressed to the bureau from respondent Royal Memories that is postmarked February 15, 2017, and contains a certified mail tracking number ending in 7804. Respondent also submitted tracking results printed from the U.S. Postal Service (USPS) website and a copy of a USPS domestic return receipt, both bearing the same tracking number as the envelope. The tracking results indicate the envelope was delivered to the bureau on February 17, 2017. For reasons unexplained, the return receipt indicates that the date of delivery was March 7, 2017.

Respondent also submitted five other domestic return receipts indicating delivery of mail from respondents to the bureau on varying dates in 2016, 2017 and 2018. Edwards testified that he received the domestic return receipts before the hearing and that he compared each—including the receipt with the tracking number ending in 7804—with the bureau's files for respondents. He found that each domestic return receipt corresponded to an unrelated document sent to the bureau by respondents; not to any preneed trust fund filing for 2015 or 2016.

12. Respondent also submitted a letter dated February 13, 2017, from respondent Cole to the bureau, stating that he had permission from respondent Royal Memories to surrender License No. FD 2131. That letter bears a stamp from the bureau indicating that it was received on February 17, 2017. Respondent Cole testified that he remembers sending the 2015 and 2016 preneed forms along with the February 13, 2017 letter, in the envelope sent via certified mail to the bureau. When asked why he would wait two weeks after he allegedly signed the preneed forms to send them, knowing that he was on probation and that the forms were late, he testified that he decided to send them with the 2016 forms and also that the Royal Memories establishment located in Vallejo was moving at that time.

13. Edwards testified that the bureau would not have sent the third notice or final notice letters if it had received preneed trust fund documents for 2015 from respondent. The bureau checks its records before sending a final notice. The bureau received no response from respondents to the letters it sent to them after February 2017. Cole claims that he did not respond to the letters sent after March 2017 because he had received the certified mail receipt and that he did not receive some of the letters.

14. The bureau also never received a preneed trust fund document for the year 2017 related to License No. 2131. Respondent Cole asserts that respondent Royal Memories stopped doing business under License No. FD 2131 in January 2017, so he believed that it did not need to file a preneed form for the year 2017. He now understands that a declaration of non-reporting status must also be filed upon the cessation of business.

15. Respondent Cole's testimony that he mailed the declarations of non-reporting status for the years 2015 and 2016 to the bureau in February 2017 was not credible. Edwards credibly testified that the bureau's recordkeeping system is reliable; that it contains no record of receiving the declarations before they were provided by respondents' counsel in

connection with this hearing;² and that each domestic return receipt submitted by respondent corresponds to an unrelated document from respondents. Respondent Cole's testimony that he waited until February 15, 2017, to send the 2015 forms because he wanted to send them with the 2016 forms is not credible because both the 2015 and 2016 forms were dated February 1, 2017. It is more likely that the envelope sent via certified mail on February 15, 2017, and delivered February 17, 2017, contained only the February 13, 2017 surrender letter. It is unlikely that, if he had already sent the forms and retained copies, respondent Cole would have ignored the three subsequent sets of warning letters from the bureau. Accordingly, it is found that respondents did not submit preneed trust fund documents (audits or declarations of non-reporting status) for the years 2015 and 2016 to the bureau until respondents' counsel provided them in connection with this proceeding.

Rehabilitation Evidence

16. Respondent Cole is a graduate of Cypress Mortuary College. In addition to his funeral director license, he holds licenses as a cemetery manager, crematory manager, and embalmer. He founded respondent Royal Memories in 2010.

17. Respondent Cole admitted at hearing that "organization is not one of his best talents." In order to better manage his business affairs, he hired an office manager who has worked full time for the last three years and he has also employed a personal assistant for the last two years. He also implemented a new system for handling mail pursuant to which bills are hung on the wall. He testified that any correspondence from the bureau now receives prompt attention.

18. Respondents submitted a letter from Crystal Edwards, dated October 31, 2018. She reports that Royal Memories provided funeral services for her sister under very difficult circumstances. She reports that respondent Cole's "professionalism, care, concern, and empathy during that time was impeccable and really went beyond our expectations" and that her "family is forever grateful for the professionalism, empathy, and care we received from Royal Memories Funeral Home."

19. Respondents submitted an electronic letter, dated October 31, 2018, from Bishop George Wordlaw III of Lily of the Valley Christian Center. Bishop Wordlaw reports that he has known respondent Cole for many years and that he is efficient, detail-oriented, and extremely competent. He also finds respondent Cole passionate and caring. He highly recommends respondents "for any endeavor that they may seek to pursue."

Costs

20. In connection with the investigation and enforcement of this accusation and petition to revoke probation, complainant requests an award of costs in the total amount of

² The date that respondent's counsel first produced the declarations to complainant's counsel was not established at hearing.

\$5,132.50 in attorney and paralegal services provided by the Department of Justice and billed to the bureau. That request is supported by a declaration that complies with the requirements of California Code of Regulations, title 1, section 1042. In the absence of any argument or evidence to the contrary those costs are found to be reasonable.

LEGAL CONCLUSIONS

Standard of Proof

1. Except as otherwise provided by law the burden of proof requires proof by a preponderance of the evidence. (Evid. Code, § 115.) Burden of proof means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. (*Ibid.*) In a disciplinary proceeding against a licensee, the complainant is required to prove cause for discipline as alleged in his or her pleading. (*Id.* at § 500.)

The standard of proof applicable to a petition to revoke probation is preponderance of the evidence. (*Sandarg v. Dental Bd. of California* (2010) 184 Cal.App.4th 1434, 1441.) The standard of proof applicable to an accusation against a licensee depends whether the license is determined to be a professional license, in which case the standard of proof is the clear and convincing standard. That determination depends on the amount of education, training, or work entailed in obtaining the license at issue. (See *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1892–95.) The standard applicable to funeral establishment licenses is a preponderance of the evidence. The standard applicable to a funeral director's license is unclear and no evidence or argument on the issue was submitted by the parties. However, in this case it is not necessary to decide that issue because complainant proved cause for discipline of all the licenses and cause to revoke respondent Cole's probation by clear and convincing evidence.

Cause for Discipline of Respondents' Licenses

2. The bureau may suspend or revoke the license of any funeral establishment or funeral director who commits unprofessional conduct, which includes violating any provision of the Cemetery and Funeral Act (§ 7600 et seq.) or the regulations adopted thereunder. (§§ 7703, 7707, 7711.1, subd. (a), see § 7739.)

Respondent Cole is the licensed funeral director responsible for Royal Memories' regulated activities. (§ 7616.2; Factual Finding 4.)

If a funeral establishment enters into any pre-need arrangements, contracts or plans, it is required to (a) submit a copy of an independent certified audit of such funds to the bureau within 120 days of the close of the funds' fiscal year (Bus. & Prof. Code, § 7737.3; Cal. Code Regs., tit. 16, § 1269, subd. (a).) It was not established that respondents entered into any pre-need arrangements, contracts or plans. Accordingly, it was not established that

respondent violated section 7737.3 or California Code of Regulations, title 16, section 1269, subdivision (a).

However, if exempt from those filing requirements, each funeral establishment must file a declaration of non-reporting status with the bureau on or before May 1 of each year. (§ 7746, subds. (a) & (b)). As set forth in Factual Finding 15, respondents failed to timely file such declarations for the years 2015 and 2016, thereby violating section 7746, subdivisions (a) and (b). Cause was therefore established to discipline the license of each respondent under sections 7703, 7707, 7711.1, subdivision (a), and 7739.³

Cause for Revocation of Respondent Cole's Probation (Failure to Fully Comply with all the Conditions of Probation)

3. The terms and conditions of respondent Cole's probation include that he obey all laws pertaining to funeral establishments. (Factual Finding 6.) He violated that term and condition by failing to cause Royal Memories to timely file preneed trust fund documents for the years 2015 and 2016. (Factual Finding 15; Legal Conclusion 2.) Accordingly, cause exists to set aside the stay order and impose the stayed revocation of his license.

Determination of Discipline

4. Cause for discipline having been established, the remaining issue is what level of discipline is required to protect the public. (§ 7601.1 ["protection of the public shall be paramount"].) Where a licensee is found to have committed unprofessional conduct, the bureau's disciplinary guidelines recommend a maximum penalty of revocation of the license and a minimum penalty of revocation, stayed, with a 30-day suspension and a five-year period of probation. (Disciplinary Guidelines for Funeral Establishments, Funeral Directors, Embalmers, and Apprentice Embalmers, p. 7 [Sept. 1997]; Cal. Code Regs., tit. 16, § 1253.6.) However, the guidelines provide that outright revocation is warranted in cases involving repeated offenses. (*Id.* at p.1.)

RESPONDENT COLE, FUNERAL DIRECTOR LICENSE NO. FDR 2589

5. Complainant recommends revocation of respondent Cole's funeral director's license. Respondent Cole argues that revoking his license "for late or misplaced forms would be a gross miscarriage of justice." Respondent Cole was disciplined in 2014 and 2017 and is on probation. His failure to cause Royal Memories to timely file the preneeds

³ Respondents concede that their late filing of the 2015 preneeds forms violated section 7703 and "constitutes grounds for disciplinary action," but argue that complainant "has failed to cite an applicable statutory provision pertaining *specifically* to the late filing of a Preneed Form because such a statute or regulation *does not exist*." (Emphasis in original). However, section 7746, subdivisions (a) and (b), expressly require funeral establishments to file a declaration of non-reporting status with the bureau on or before May 1 of each year, if exempt from audit reporting requirements.

documents for 2015 and 2016 is aggravated by the failure to file a declaration of non-reporting status for 2017 and his lack of candor at hearing. Those failures and his previous record of discipline evidence a pattern of failing to comply with the laws pertaining to funeral establishments, despite multiple periods of probation, including "a final opportunity to demonstrate to the bureau that he can comply with all regulatory requirements" His office manager and personal assistant were hired three and two years ago, respectively, but did not prevent or cure the ongoing violations. The two letters of support do not address regulatory compliance. Respondent Cole repeatedly violated the laws pertaining to funeral establishments and failed to demonstrate sufficient rehabilitation for continued licensure in this highly-regulated industry. No basis was established to deviate from the bureau's disciplinary guidelines. Revocation of respondent Cole's probation and license is necessary to protect the public.

RESPONDENT ROYAL MEMORIES, FUNERAL ESTABLISHMENT LICENSE NOS. FD 2077 AND FD 2131

6. License Nos. FD 2077 and FD 2131 of respondent Royal Memories have not previously been disciplined. However, respondent Royal Memories' License No. FD 2078 was disciplined in 2014 and 2017. Moreover, respondent Cole has served as the president of respondent Royal Memories and been the licensed funeral director responsible for the regulated activities of License Nos. FD 2077 and FD 2131 since they were issued in 2011 and 2012, respectively. At hearing there was no evidence that anyone else has ever had a significant role in the management of respondent Royal Memories. Respondent Royal Memories failed to establish that it has made the changes necessary to assure the bureau that it will comply with regulatory requirements. Accordingly, revocation of License Nos. FD 2077 and FD 2131 is necessary to protect the public.

Costs

7. A licensee who is found to have committed a violation of the licensing act may be ordered to pay a sum not to exceed the reasonable costs of investigation and enforcement. (§ 125.3.) Cause exists to order respondents to pay the bureau costs in the amount of \$5,132.50. (Factual Finding 20 & Legal Conclusions 2 & 3.)

8. Cost awards must not deter licensees with potentially meritorious claims from exercising their right to an administrative hearing. (*Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45.) Cost awards must be reduced where a licensee has been successful at hearing in getting the charges dismissed or reduced; a licensee is unable to pay; or where the scope of the investigation was disproportionate to the alleged misconduct. (*Ibid.*) The agency must also consider whether the licensee has raised a colorable challenge to the proposed discipline, and a licensee's good faith belief in the merits of his or his position. (*Ibid.*) Here, no basis for a *Zuckerman* reduction was established.

ORDER

1. The stay of revocation imposed in Case No. A1 2015 219 is lifted and the order of revocation of Funeral Director License No. FDR 2589, issued to Harold Dwight Cole, is imposed.
2. Funeral Director License No. FDR 2589, issued to Harold Dwight Cole, is revoked.
3. Funeral Establishment License Nos. FD 2077 and FD 2131, issued to Royal Memories Funeral and Cremation Services, Inc., Harold D. Cole, president, are revoked.
4. Royal Memories Funeral and Cremation Services, Inc. and Harold D. Cole are jointly and severally liable and shall pay to the bureau the reasonable costs of investigation and enforcement in the amount of \$5,132.50.

DATED: December 4, 2018

DocuSigned by:
Michael Starkey
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MICHAEL C. STARKEY
Administrative Law Judge
Office of Administrative Hearings

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7
8 **BEFORE THE**
9 **DEPARTMENT OF CONSUMER AFFAIRS**
10 **FOR THE CEMETERY AND FUNERAL BUREAU**
11 **STATE OF CALIFORNIA**

11 In the Matter of the Accusation and Petition to
12 Revoke Probation Against:

Case No. A1 2017 393

13 **ROYAL MEMORIES FUNERAL AND**
14 **CREMATION SERVICES, INC.**

ACCUSATION AND PETITION TO
REVOKE PROBATION

15 **Harold D. Cole, President**
16 **1469 Alabama Street**
17 **Vallejo, CA 94590**

18 **Funeral Establishment License No. FD 2131**

19 **And**

20 **ROYAL MEMORIES FUNERAL AND**
21 **CREMATION SERVICES, INC.**

22 **Harold D. Cole, President**
23 **1300 Clay Street, Suite 600**
24 **Oakland, CA 94612**

25 **Funeral Establishment License No. FD 2077**

26 **And**

27 **HAROLD DWIGHT COLE**
28 **2605 9th Avenue, Apt. E**
Oakland, CA 94606

Funeral Director License No. FDR 2589

Respondents.

Complainant alleges:

1 PARTIES

2 1. Lisa M. Moore (Complainant) brings this Accusation and Petition to Revoke
3 Probation solely in her official capacity as the Bureau Chief of the Cemetery and Funeral Bureau,
4 Department of Consumer Affairs.

5 2. On or about January 13, 2011, the Cemetery and Funeral Bureau issued Funeral
6 Establishment License Number FD 2077 to Royal Memories Funeral and Cremation Services,
7 Inc., Harold D. Cole, President (Respondent). The Funeral Establishment License was in full
8 force and effect at all times relevant to the charges brought herein and will expire on January 31,
9 2019, unless renewed.

10 3. On or about May 16, 2012, the Cemetery and Funeral Bureau issued Funeral
11 Establishment License Number FD 2131 to Royal Memories Funeral and Cremation Services,
12 Inc., Harold D. Cole, President (Respondent). The Funeral Establishment License was in full
13 force and effect at all times relevant to the charges brought herein and expired on May 31, 2017.

14 4. On or about August 17, 2005, the Cemetery and Funeral Bureau issued Funeral
15 Director License Number FDR 2589 to Harold Dwight Cole (hereinafter "Respondent Cole").
16 The Funeral Director License was in full force and effect at all times relevant to the charges
17 brought herein and will expire on August 31, 2018, unless renewed.

18 5. In a disciplinary action entitled "*In the Matter of the Accusation and Petition to*
19 *Revoke Probation Against Royal Memories Funeral and Cremation Services, Inc. and Harold*
20 *Dwight Cole*," Case No. A 2015 219, the Cemetery and Funeral Bureau issued a Decision and
21 Order effective March 23, 2017, in which Funeral Director License No. 2589 was revoked.
22 However, the revocation was stayed and the Funeral Director License was placed on probation for
23 two (2) years with certain terms and conditions. A copy of that Decision and Order is attached as
24 Exhibit A and is incorporated by reference.

25 JURISDICTION AND STATUTORY PROVISIONS

26 6. This Accusation and Petition to Revoke Probation is brought before the Director of
27 the Department of Consumer Affairs (Director) for the Cemetery and Funeral Bureau, under the
28 authority of the following laws. All section references are to the Business and Professions Code

1 ("Code") unless otherwise indicated.

2 7. Section 118(b) of the Code states:

3 The suspension, expiration, or forfeiture by operation of law of a license issued by a board
4 in the department, or its suspension, forfeiture, or cancellation by order of the board or by order
5 of a court of law, or its surrender without the written consent of the board, shall not, during any
6 period in which it may be renewed, restored, reissued, or reinstated, deprive the board of its
7 authority to institute or continue a disciplinary proceeding against the licensee upon any ground
8 provided by law or to enter an order suspending or revoking the license or otherwise taking
9 disciplinary action against the licensee on any such ground.

10 STATUTES AND REGULATIONS

11 8. Section 7615 of the Code states:

12 A funeral director is a person engaged in or conducting, or holding himself or herself out as
13 engaged in any of the following:

14 (a) Preparing for the transportation or burial or disposal, or directing and supervising for
15 transportation or burial or disposal of human remains.

16 (b) Maintaining an establishment for the preparation for the transportation or disposition or
17 for the care of human remains.

18 (c) Using, in connection with his or her name, the words "funeral director," or "undertaker,"
19 or "mortician," or any other title implying that he or she is engaged as a funeral director.

20 9. Section 7686 of the Code states, in pertinent part, that the bureau may suspend or
21 revoke licenses, after proper notice and hearing to the licensee, if the licensee has been found
22 guilty by the bureau of any of the acts or omissions constituting grounds for disciplinary action.
23 The proceedings under this article shall be conducted in accordance with Chapter 5 of Part 1 of
24 Division 3 of Title 2 of the Government Code, 1 and the bureau shall have all the powers granted
25 therein.

26 10. Section 7703 of the Code states:

27 Violation of any of the provisions of this chapter or of the rules and regulations adopted
28 pursuant to this chapter constitutes a ground for disciplinary action.

1 11. Section 7707 of the Code states:

2 Gross negligence, gross incompetence or unprofessional conduct in the practice of funeral
3 directing or embalming constitutes a ground for disciplinary action.

4 12. Section 7711.1 of the Code states, in pertinent part:

5 Unprofessional conduct by any licensee or registrant or by any agent or employee of a
6 licensee or registrant constitutes grounds for disciplinary action. Unprofessional conduct includes,
7 but is not limited to, the following:

8 (a) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the
9 violation of this chapter and any regulation adopted thereunder, or of any federal or state law or
10 regulation governing the disposition of human remains, operation of cemeteries or crematories,
11 the sale of cemetery property, or the sale of crematory services or commodities.

12 ...
13 13. Section 7737.3 of the Code states:

14 All commingled preneed trust funds held by a funeral establishment shall be subject to an
15 annual, independent certified financial audit with a copy of the audit to be submitted to the bureau
16 for review within 120 days of the close of the fund's fiscal year. Any findings of noncompliance
17 with existing law regarding preneed trust funds shall be identified by the auditor in a separate
18 report for review and action by the bureau. Audits and reports of noncompliance shall be filed
19 simultaneously.

20 14. Section 7739 of the Code states:

21 Any person willfully violating the provisions of this article or any of them shall be
22 punishable either by imprisonment in a county jail for a period not exceeding six months, or by
23 fine not exceeding five hundred dollars (\$500), or by both imprisonment and fine, or by
24 imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for 16 months, or
25 two or three years. If the violator is a funeral establishment licensee, he or she shall also be
26 subject to disciplinary action as provided in Article 6 (commencing with Section 7686).

27 15. Section 7746 of the Code states:

28 (a) Notwithstanding any other provision of law, a funeral establishment that is otherwise

1 exempt from the requirement of filing an annual preneed trust report or whose preneed trust funds
2 are reported in a combined preneed annual preneed trust report, shall annually file a declaration of
3 nonreporting status with the bureau.

4 (b) The declaration shall be filed on or before May 1 of each year and shall also be filed
5 upon the transfer of ownership or the cessation of business.

6 (c) The declaration shall be filed on a form provided by the bureau and shall include, but
7 shall not be limited to, both of the following:

8 (1) The basis upon which the funeral establishment is exempt from the annual trust
9 reporting requirement.

10 (2) The specific kind and nature of the exempt preneed arrangements, if any, in which the
11 funeral establishment engages.

12 (d) The declaration shall be verified by the funeral establishment's owner, a partner, or in
13 the case of a corporation, by the president or vice president.

14 16. California Code of Regulations, title 16, section 1269 states, in pertinent part:

15 (a) Each licensed funeral establishment and licensed funeral director who enters into any
16 pre-need arrangements, contracts or plans described in and subject to the provisions of Article 9,
17 Chapter 12, Division 3 of the Business and Professions Code shall file with the bureau annually
18 on or before May 1 of each year and upon transfer of license or cessation of business, a written,
19 verified or audited report, on form 21 P-4A (1/94) prescribed and furnished by the bureau,
20 pertaining to funds received and held under such arrangements, contracts or plans. Firms utilizing
21 a fiscal year accounting system may request permission, in writing to the bureau chief to file said
22 report on a fiscal year basis and, if permission is granted, said report shall then be filed with the
23 bureau no later than one hundred twenty (120) days from the date of the close of said fiscal year.

24 (b) The report required under this Article shall accompany the forms of assignment or
25 transfer of a funeral establishment license. The report required hereunder upon cessation of
26 business as a licensed funeral establishment shall be submitted thirty (30) days prior to such
27 cessation of business.

28 (c) In cases where trust corpus is deposited in individual savings accounts, and not

1 commingled for investment purposes, the bureau may require a verified report. Said requirement
2 of verification shall be deemed complied with by a verification under penalty of perjury by the
3 owner, partners, or, in the case of a corporation, by the president or vice-president and one (1)
4 other officer thereof and, in addition thereto, all reports must contain a verification under penalty
5 of perjury executed by at least two (2) trustees not employed by the funeral establishment and, in
6 the case of a banking institution or trust company legally authorized to act as a trustee within the
7 meaning of Section 7736 of Article 9, Chapter 12, Division 3, of the Business and Professions
8 Code, a verification under penalty of perjury on behalf of such trustee by an authorized
9 representative of said trustee.

10 (d) In cases where trust funds have been commingled for purposes of investment, the
11 bureau may require, in addition to the written report required by subsection (a) of this section, an
12 independent audit report prepared and signed by a Certified Public Accountant or Public
13 Accountant, currently licensed in the State of California, which certifies compliance with the
14 provisions of Article 9, Chapter 12, Division 3 of the Business and Professions Code and the
15 provisions of this Article.

16 (e) All written reports required under this section shall include, but are not limited to, a
17 statement setting forth:

18 (1) Amounts collected pursuant to pre-need arrangements, contracts or plans, or any
19 agreements collateral thereto;

20 (2) Amounts deposited with the trustee and held in trust;

21 (3) Amounts of authorized expenditures of income allocable to individual accounts,
22 itemized as to the nature of expenditures;

23 (4) Amount of authorized expenditures of income paid, itemized as to the nature of
24 expenditure; and

25 (5) Separately, the total amount of such trust funds invested in each of the investments
26 authorized by law and the amount of cash on hand not invested which statement actually show the
27 financial condition of the trust funds.

28 (f) Two (2) or more funeral establishments who utilize a common trust fund to hold and

1 administer payments received under pre-need contracts may cause the trustee of that common
2 trust fund to file one (1) combined annual report regarding all such pre-need contracts, provided
3 each funeral establishment's information is disclosed separately.

4 17. California Code of Regulations, title 16, section 1269(a), states:

5 Each licensed funeral establishment and licensed funeral director who enters into any pre-
6 need arrangements, contracts or plans described in and subject to the provisions of Article 9,
7 Chapter 12, Division 3 of the Business and Professions Code shall file with the bureau annually
8 on or before May 1 of each year and upon transfer of license or cessation of business, a written,
9 verified or audited report, on form 21 P-4A (1/94) prescribed and furnished by the bureau,
10 pertaining to funds received and held under such arrangements, contracts or plans. Firms utilizing
11 a fiscal year accounting system may request permission, in writing to the bureau chief to file said
12 report on a fiscal year basis and, if permission is granted, said report shall then be filed with the
13 bureau no later than one hundred twenty (120) days from the date of the close of said fiscal year.

14 COSTS

15 18. Section 125.3 of the Code provides, in pertinent part, that the [Bureau] may request
16 the administrative law judge to direct a licensee found to have committed a violation or
17 violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation
18 and enforcement of the case.

19 CAUSE FOR DISCIPLINE

20 (Failure to File Audits of Pre-Need Funds)

21 19. Respondents are subject to disciplinary action under Code sections 7703, 7707,
22 7737.3 and 7739, and pursuant to California Code of Regulations, title 16, section 1269(a), in that
23 Respondents acted unprofessionally and violated applicable statutes and regulations which
24 required the submission of annual audits. The circumstances are as follows:

25 20. 2015 Reports: Respondents were legally required to file either a preneed funeral trust
26 fund audit or a declaration of non-reporting status for the year 2015. Respondents failed to file
27 either for 2015 despite the fact that the Bureau sent reminder notices to Respondents on October
28 19 and December 6, 2016, and on February 8 and July 14, 2017.

1 21. 2016 Reports: Respondents were legally required to file either a preneed funeral trust
2 fund audit or a declaration of non-reporting status for the year 2016. Respondents failed to file
3 either for 2016 despite the fact that the Bureau sent a reminder notice to Respondents on
4 September 14, 2017:

5 **PETITION TO REVOKE PROBATION**

6 22. The allegations of paragraphs 1 through 21 of the Accusation/Petition to Revoke
7 Probation are incorporated herein by reference and are realleged as if fully set forth.

8 **CAUSE TO REVOKE PROBATION**

9 (Failure to Obey Laws)

10 23. At all times after the effective date of Respondent Cole's probation in Case No. A1
11 2015 219, the Bureau's Order stated as a condition of probation, in pertinent part:

12 *[Respondent] shall comply with all conditions of probation and obey all federal,*
13 *state, and local laws, and all rules and regulations governing the programs regulated by*
14 *the department.*

15 24. Respondent Cole's probation in Case No. A1 2015-219 is subject to revocation
16 because Respondent Cole failed to comply with this condition. The circumstances are as follows:

17 25. Respondent has failed to obey all laws, as set forth above in the Cause for Discipline.

18 **PRAYER**

19 WHEREFORE, Complainant requests that a hearing be held on the matters alleged in this
20 Accusation and Petition to Revoke Probation, and that following the hearing, the Director of
21 Consumer Affairs issue a decision:

22 1. Based upon the Petition to Revoke Probation, revoking the probation that was granted
23 by the Cemetery and Funeral Bureau in Case No. A 2015 219 and imposing the disciplinary order
24 that was stayed thereby revoking Funeral Director License Number FDR 2589, issued to Harold
25 Dwight Cole;

26 2. Based on the Accusation, revoking or suspending Funeral Director License Number
27 FDR 2589, issued to Harold Dwight Cole, Funeral Establishment License Number FD 2077,
28 issued to Royal Memories Funeral and Cremation Services, Inc., Harold D. Cole, President, and

1 Funeral Establishment License Number FD 2131, issued to Royal Memories Funeral and
2 Cremation Services, Inc., Harold D. Cole, President;

3 3. Ordering Respondents to pay the Director of Consumer Affairs the reasonable costs
4 of the investigation and enforcement of this case, pursuant to Business and Professions Code
5 section 125.3; and

6 4. Taking such other and further action as deemed necessary and proper.

7
8 DATED:

March 8, 2018

Lisa M. Moore

LISA M. MOORE

Bureau Chief

Cemetery and Funeral Bureau

Department of Consumer Affairs

State of California

Complainant

Exhibit A

Decision and Order

Cemetery and Funeral Bureau Case No. A 2015 219

**BEFORE THE
CEMETERY AND FUNERAL BUREAU
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation and Petition
to Revoke Probation Against:

ROYAL MEMORIES FUNERAL AND
CREMATION SERVICES INC.,
Harold D. Cole, President and Manager,

Funeral Establishment License No. FD 2078

HAROLD DWIGHT COLE,

Funeral Director License No. FDR 2589

Case No. A1 2015 219

OAH No. 2016051070

Respondents.

DECISION AFTER REJECTION OF PROPOSED DECISION

Administrative Law Judge Juliet E. Cox, State of California, Office of Administrative Hearings, heard this matter on September 20, 2016, in Oakland, California.

Jonathan D. Cooper, Deputy Attorney General, represented complainant Lisa M. Moore, Chief of the Cemetery and Funeral Bureau (Bureau).

Respondent Harold Dwight Cole (Cole) represented himself and Respondent Royal Memories Funeral and Cremation Services Inc. (Royal Memories).

The matter was submitted on September 20, 2016.

The Administrative Law Judge issued her Proposed Decision on October 12, 2016. After due consideration thereof, the Director declined to adopt said proposed decision and thereafter on October 26, 2016, issued an Order of Rejection of the Proposed Decision. After receipt of the transcripts, the Director issued an Order Fixing Date for Submission of Written Argument, which was served on January 12, 2017. Written argument having been received from the Complainant, and the time for filing written argument in this matter having expired, and the entire record, including the transcript of said hearing having been read and considered, the Director of the Department of Consumer Affairs pursuant to Section 11517 of the Government Code hereby makes the following decision:

FACTUAL FINDINGS

1. On August 17, 2005, the Bureau issued Funeral Director License No. FDR 2589 to Respondent Cole. This license was active at all times relevant to this matter, and as of the date of this hearing was scheduled to expire on August 31, 2017.

2. On January 13, 2011, the Bureau issued Funeral Establishment License No. FD 2078 to Respondent Royal Memories for a funeral establishment on Redwood Drive in San Rafael. Respondent Cole is the president of Royal Memories and is responsible for Royal Memories' activities as a licensed funeral establishment. Royal Memories surrendered this license in late February 2015, and the Bureau cancelled it effective March 3, 2015.

3. Respondent Royal Memories also holds two other funeral establishment licenses for different locations, one in Oakland and one in Vallejo. Those licenses are not at issue in this proceeding.

Prior Disciplinary Action

4. After a hearing in August 2014, the Department of Consumer Affairs (Department) revoked Funeral Director License No. FDR 2589 and Funeral Establishment License No. FD 2078. The Department stayed the revocations and placed the licenses on probation for three years effective November 13, 2014.

5. The Department found in the prior disciplinary proceeding that Respondent Cole's funeral director license had expired on August 31, 2012, and that he had waited several months to renew it. The Department made no finding in the prior proceeding regarding whether Cole had engaged in any activities requiring licensure as a funeral director between September 1, 2012, and the date he renewed his funeral director license.

6. The Department found in the prior disciplinary proceeding that Respondent Royal Memories had moved out of its Redwood Drive office in September 2012, after having stopped doing business there earlier in 2012. It was found as well that Royal Memories had neither notified the Bureau that Royal Memories would cease operating its funeral establishment on Redwood Drive nor received Bureau permission to operate a funeral establishment at a new location. Royal Memories had an active website in August 2014, however, listing a business address for Royal Memories on Fourth Street in San Rafael that the Bureau had never approved.¹ The Department made no finding in the prior proceeding regarding whether Royal Memories ever actually had used the Fourth Street location for any activities requiring licensure of that location as a funeral establishment.

7. The conditions of Respondents' probation beginning November 13, 2014, included a condition requiring both Respondents to "comply with all conditions of probation and

¹ The website also listed the Oakland and Vallejo business addresses that the Bureau had approved for Royal Memories' other funeral establishment licenses.

obey all federal, state and local laws, and all rules and regulations governing the programs regulated by the department." In addition, it included a condition requiring Respondent Cole, within 30 days of the effective date of the Decision, to submit for prior departmental approval a course of Ethics. He was also required to complete the course within the first year of probation.

Allegations in this Proceeding: Accusation and Petition to Revoke Probation

8. On January 6, 2016, acting in her official capacity as chief of the Bureau, Complainant Lisa M. Moore (Complainant) served Respondents with an Accusation (Accusation) and Petition to Revoke Probation (Petition).

9. Complainant alleged that on or about December 12, 2014, the Bureau issued Respondents a letter denying their application for a change of location for Royal Memories funeral establishment to 10000 Fourth Street, Suite 800, San Rafael, CA. The pleading further alleged that the Bureau informed Respondents they were required to either surrender Royal Memories Funeral Establishment License No. FD 2078 or submit a new application for another location within thirty days. On February 21, 2015, Royal Memories Funeral Establishment surrendered Funeral Establishment License No. FD 2078, and on March 3, 2015, the Bureau cancelled the license. Complainant further alleged that notwithstanding Funeral Establishment License No. FD 2078's cancellation, Respondents' have continued to advertise that they are open for business at the 1000 Fourth Street location in San Rafael. In addition, Complainant alleged in the Petition that Respondent Cole had not satisfied the probation condition requiring him to complete an ethics course.

10. Complainant contended that these actions violated the probation conditions identified in Finding 7, above, and that operating at or advertising the Fourth Street location violated the Cemetery and Funeral Act (Bus. & Prof. Code, § 7600 et seq.). Complainant sought revocation of Respondents' probation and licenses, and Respondents requested a hearing.

Unlicensed Funeral Establishment

11. Sandra Patterson, a Bureau probation monitor who was assigned to monitor Respondents' probation, testified regarding compliance issues relative to the Respondents' probation on behalf of the Complainant. In February 2014, while the prior disciplinary proceeding was pending, Respondent Royal Memories applied to the Bureau for permission to conduct business under Funeral Establishment License No. FD 2078 at the Fourth Street location in San Rafael.

12. The Bureau denied this application in December 2014, on the ground that this location did not have suitable space for storing or handling human remains. The Bureau's letter denying this application noted that a Bureau Field Representative had visited the location on November 24, 2014 and that he had identified the location was "a 'virtual office' ... available on an hourly to monthly basis for the receipt of mail, telephone answering services, and office rental space on an as-needed basis."

13. Respondent Cole testified on behalf of Respondents. He explained that he intended to use the Fourth Street location as a "satellite" office for Royal Memories. He had not planned to handle human remains there, but had planned only to use the office space for client conferences.

14. After receiving the Bureau's letter denying permission for Royal Memories to operate a funeral establishment at the Fourth Street location, Respondent Royal Memories elected to surrender Funeral Establishment License No. FD 2078. Royal Memories retained its licenses for funeral establishments in Oakland and Vallejo, and continued to use those locations in its business.

15. The Administrative Law Judge in this case found that Respondent Cole testified credibly that he had never met with any client or potential client at the Fourth Street location.² However, since it was not explained why the Administrative Law Judge determined that Respondent Cole was credible, this finding is not given great weight.

16. As recently as December 23, 2015, a website at the address <www.royalmemories.funeralplan2.com> included a graphic element consisting of a photograph with text arranged around it stating three addresses for Royal Memories. The graphic element was an electronic version of the image on glossy cards that Respondent Cole had obtained to advertise Royal Memories. The graphic element included the Oakland and Vallejo addresses for which Royal Memories holds funeral establishment licenses, as well as the Fourth Street address that the Bureau had never approved for a funeral establishment; it also included funeral establishment license numbers for each address. The graphic element included only one telephone number for Royal Memories.

17. Elsewhere, the website repeated Royal Memories' business addresses and telephone number. Beginning in or before March 2015, that text stated only the licensed Oakland and Vallejo addresses, but not any address in San Rafael.

18. Respondent Cole testified that he does not maintain his business's website. Instead, he contracts with a vendor, Aurora Caskets, to host and maintain the site. In the past, he has communicated with staff members at Aurora Caskets about the website simply by calling them on the telephone. More recently, he has delegated responsibility for interacting with Aurora Caskets to a family member who has begun working for Royal Memories.

19. Respondent Cole testified that shortly after the prior disciplinary proceeding,

² Government Code section 11425.50(b) states, in pertinent part, "If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it." The ALJ's finding of credibility did not contain any observations of demeanor or attitude of Respondent Cole.

he telephoned a staff member at Aurora Caskets and asked that person to remove the Fourth Street address from the Royal Memories website.³ He did not realize, however, that to eliminate that address from the graphic element he would need to provide a new electronic version of the element. Furthermore, he did not visit the website to confirm that Aurora Caskets had removed the address in accordance with his request, and did not realize for many months that the address persisted on the website in the graphic element.

20. Since December 23, 2015, Aurora Caskets has revised the Royal Memories website completely, removing any references to the Fourth Street address. Respondent Cole also has procured new advertising cards that list only the licensed Oakland and Vallejo addresses for Royal Memories.

Ethics Course

21. On December 4, 2014, Ms. Patterson sent Respondents a letter reminding Respondent Cole that he needed to submit information to the Bureau by December 13, 2014, regarding the ethics course he proposed to take to fulfill that probation condition.

22. Over the next several weeks, Ms. Patterson and Respondent Cole communicated regarding courses Cole might take to satisfy the probation condition. Respondent Cole sent Patterson a course description for a course titled "Business 75: Salesmanship" that Cole proposed to take at Laney College during the Spring 2015 semester. While Patterson was out of the office on a holiday vacation, another Bureau employee approved this course to satisfy the probation requirement.

23. After Ms. Patterson returned from her vacation, she contacted the Admissions and Records Department at Peralta⁴ to confirm the course description and schedule for Business 75 during the Spring 2015 semester. Patterson learned that neither Laney College nor any other Peralta college would offer that course during Spring 2015.

24. In February 2015, Respondent Cole prepared and submitted his first quarterly compliance report for his probation monitor. On that report, Cole stated that he had failed to comply with a probation condition, and explained that he had been unable to register for an ethics course "due to my health." Regardless of Respondent Cole's health during this period, this explanation was misleading at best; the true reason that Respondent Cole was unable to register for the ethics course the Bureau had approved was that no such course was available in Spring 2015.

25. After filing this February 2015 quarterly report, Respondent Cole did not propose

³ The Administrative Law Judge similarly found this testimony credible but failed to explain why. For the same reasons expressed in paragraph 15, this finding is not given great weight.

⁴ Laney College is one of several community colleges in the east Bay Area operated by the Peralta Community College District (Peralta).

any other courses to Patterson to satisfy the probation condition requiring him to take an ethics course. In May 2015, however, Respondent Cole prepared his second quarterly compliance report, and falsely attested under penalty of perjury on that report that he had complied with all conditions of his probation during the period between mid-February and mid-May. The form report signed by Respondent Cole indicates that he read the report "in its entirety and know its contents and that all statements made are true, and I understand that misstatements or omissions of material fact may be cause for revocation of probation." At hearing, Respondent Cole characterized these inaccurate statements as "honest mistakes."

26. Months after Respondent Cole was served with an Accusation and Petition by the Bureau alleging violations of probation, Respondent Cole took and passed a course at Berkeley City College titled "Business 2: Introduction to Business Law," and took and passed Business 75 at Laney College in summer 2016. Both of these courses included ethics components.

27. Respondent Cole testified candidly that he had construed the probation condition requiring him to take an ethics course as an insult to his integrity, and believed that the Bureau had overreached by requiring him to take such a course. After completing Business 2 and Business 75, however, Respondent realized that both courses had given him valuable new information that is directly relevant to management of his business.

Additional Evidence

28. In addition to operating Royal Memories, Respondent Cole works in a hospital or clinic setting with mentally ill patients. Twice since 2013, he has suffered temporary disability because of on-the-job injuries. One of these injuries was a head injury that occurred in late 2014, very near to the effective date of the prior disciplinary order. Respondent missed several weeks of work in early 2015 because of this injury.

29. Respondent Cole has worked in the funeral services industry for about 16 years, first in Southern California and since 2008 in the Bay Area. He takes great professional pride in serving families honestly and compassionately during difficult personal circumstances.

30. After the prior disciplinary proceeding, Respondent Cole realized that he needed help to manage Royal Memories properly. He believes that his family member's administrative help has greatly improved management of the business.

31. Respondent Cole knows of no complaints or investigations about him or Royal Memories pertaining to their treatment of clients, money, personal effects such as jewelry or clothing, or human remains. Routine Bureau inspections of Royal Memories' licensed funeral establishments have not identified any problems relating to sanitation or management.

Costs

32. The California Department of Justice, Office of the Attorney General, has charged the Bureau \$3,300 for prosecution costs on this matter. Complainant's claim for these

costs is supported by a declaration that complies with California Code of Regulations, title 1, section 1042. These prosecution costs are reasonable.

LEGAL CONCLUSIONS

Public Protection

1. Public protection is the highest priority for the Bureau in exercising its licensing, regulatory, and disciplinary functions. (Business and Professions Code section 7601.1) The Department imposes discipline to fulfill its public protection mandate. Since funeral establishments and funeral directors hold positions of trust in the community, it is very important that the Bureau's licensees are aware of and abide by applicable funeral establishment laws and the Bureau's decisions implementing those laws for the protection of the public.

Standard/Burden of Proof

2. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. Burden of proof means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. (Evidence Code, § 115.)

3. In a proceeding involving revocation of a license and Petition to Revoke Probation, the burden is on the Complainant to introduce evidence sufficient to avoid a ruling against her on the allegations alleged in the Accusation and Petition. (Evidence Code, § 500.) The Complainant is required to prove the allegations in the Accusation against Respondent Cole's funeral director license by clear and convincing evidence; however, the Complainant is only required to prove the allegations in the Accusation against Respondent Royal Cemetery's funeral establishment license by a preponderance of the evidence. The Complainant is required to prove the allegations in a Petition to Revoke Probation by a preponderance of the evidence." (*Sandarg v. Dental Bd. of California* (2010) 184 Cal.App.4th 1434, 1441.)

Applicable Laws

4. Business and Profession Code⁵ Section 7616(a) provides, in pertinent part, that a licensed funeral establishment "is a place of business conducted in a building or separate portion of a building having a specific street address or location and devoted exclusively to those activities as are incident, convenient, or related to the preparation and arrangements, financial and otherwise, for the funeral, transportation, burial or other disposition of human remains...." The Bureau may not license a building or a portion of a building as a funeral establishment unless the location includes a suitable space for storing or handling human remains. A person or business entity that operates a funeral establishment may, however, conduct "business or

⁵ All section references are to the Business and Professions Code (Code) unless otherwise indicated.

financial transactions" at a location different from the location where the person or business stores or handles human remains. (Bus. & Prof. Code, § 7616, subd. (d).)

5. Section 118(b) of the Code provides:

The suspension, expiration, or forfeiture by operation of law of a license issued by a board⁶ in the department, or its suspension, forfeiture, or cancellation by order of the board or by order of a court of law, or its surrender without the written consent of the board, shall not, during any period in which it may be renewed, restored, reissued, or reinstated, deprive the board of its authority to institute or continue a disciplinary proceeding against the licensee upon any ground provided by law or to enter an order suspending or revoking the license or otherwise taking disciplinary action against the licensee on any such ground.

6. Section 7617 of the Code provides:

The business of a licensed funeral establishment shall be conducted and engaged in at a fixed place or facility.

No person, partnership, association, corporation, or other organization shall open or maintain a place or establishment at which to engage in or conduct, or hold himself or herself or itself out as engaging in or conducting, the business of a funeral establishment without a license.⁷

7. Section 7628 of the Code provides:

Any person, partnership, association, corporation, or other organization desiring to change the location of a licensed funeral establishment shall apply therefor on forms furnished by the bureau and shall include a fee fixed by this chapter.

The application shall be granted by the bureau upon the filing with the bureau of a favorable report from an inspector concerning the physical status or plans and specifications of the proposed licensed funeral establishment to the effect that it conforms to the requirements of this article.

8. Section 7686 provides:

The bureau may suspend or revoke licenses, after proper notice and hearing to the

⁶ Section 22 of the Code states that "board" includes "bureau."

⁷ Business and Professions Code section 7621 was also cited in the Accusation. However, that statute was repealed in 2016 by Stats. 2015, ch. 395 § 16 (AB 180) and was therefore not considered in formulating this decision.

licensee, if the licensee has been found guilty by the bureau of any of the acts or omissions constituting grounds for disciplinary action. The proceedings under this article shall be conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the bureau shall have all the powers granted therein.

9. Section 7703 provides:

Violation of any of the provisions of this chapter or of the rules and regulations adopted pursuant to this chapter constitutes a ground for disciplinary action.

10. Section 125.3 provides, in pertinent part, that the Bureau may request the administrative law judge to "direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case."

Cause for License Discipline

11. A funeral establishment license concerns a fixed physical location. (Bus. & Prof. Code, §§ 7617, 7625.) Operating a funeral establishment at a location the Bureau has not licensed for this function is unlawful, and is a ground for license discipline. (*Id.*, §§ 7617, 7703.)

By reason of the matters set forth in Findings 11 and 12, Complainant established that respondent Royal Memories does not hold and has never held a license authorizing operation of a funeral establishment on Fourth Street in San Rafael. By reason of the matters set forth in Findings 6, 13, and 15, however, complainant did not establish that Royal Memories ever has operated a funeral establishment at this location.

12. However, the Cemetery and Funeral Act ("Act") also prohibits unlawful advertising of a funeral establishment. The Act states that no person or corporation "shall ... hold himself or herself or itself out as engaging in or conducting, the business of a funeral establishment without a license," and doing so also is grounds for discipline. (Bus. & Prof. Code, §§ 7617, 7703.) As set forth in Findings 16 through 20, respondent Royal Memories maintains a website that stated until late 2015 that Royal Memories operated a licensed funeral establishment on Fourth Street in San Rafael. Complainant established cause to discipline Royal Memories for holding itself out as conducting a funeral establishment at an unlicensed location.

13. As set forth in Finding 2, Respondent Cole is the licensed funeral director responsible for Royal Memories' regulated activities. (Bus. & Prof. Code, § 7616.2.) Cause for discipline against Royal Memories' funeral establishment license is also cause for discipline against Cole's funeral director license.

Causes for Probation Revocation

14. By reason of the matters set forth in Factual Findings 7, 11, 12, 16, through 20

and in Legal Conclusion 4-6, 9 and 12, cause exists to grant the Petition revoking probation as to Respondent Royal Memories' funeral establishment license, for violation of the requirement that Royal Memories obey all laws pertaining to funeral establishments.

15. By reason of the matters set forth in Factual Findings 2, 7, 11, 12, 16, through 20 and in Legal Conclusions 4-6, 9 and 13, cause exists to grant the Petition revoking probation as to Respondent Cole's Funeral Director License No. FDR 2589, for violation of the requirement that he cause Royal Memories to obey all laws pertaining to funeral establishments.

16. By reason of the matters set forth in Factual Findings 7, 21-27, cause exists to grant the Petition revoking probation as to Respondent Cole's funeral director license, for violation of the requirement that he complete a Bureau-approved ethics course within the first year of probation.

Disciplinary Guidelines

17. The Bureau adopted A Manual of Disciplinary Guideline for Funeral Establishments, Funeral Directors, Embalmers, and Apprentice Embalmers, September 1997 ("Disciplinary Guidelines") to assist in making the determination of the appropriate level of discipline once cause for such action has been established. (16 C.C.R. § 1253.6) The Disciplinary Guidelines is published for use by licensees, attorneys, administrators and judges so that disciplinary sanctions may be imposed fairly, consistently and completely in accordance with due process of the law.

18. The Disciplinary Guidelines recommended discipline for a violation of Business and Professions Code sections 7617 and 7703 ranges from revocation stayed with three years' probation to revocation. The Disciplinary Guidelines provides that outright revocation is warranted in cases involving repeated and/or flagrant offenses, and where serious danger or consumer harm results from a violation.

Disciplinary Considerations

19. A funeral establishment license concerns a fixed physical location. (Bus. & Prof. Code, §§ 7617, 7625.) Operating a funeral establishment at a location the Bureau has not licensed for this function is unlawful, and is a ground for license discipline. (Id., §§ 7617, 7703.) Operating a funeral establishment at an unlicensed location would be a serious disciplinary concern, because of the potential hazards of handling human remains in an inappropriate setting. In this matter, however, Respondents did not operate a funeral establishment at an unlicensed location. Rather, as set forth in Findings 16 through 19, Respondent Royal Memories carelessly maintained a website listing an office that it never actually used and characterizing that unused office as a "funeral establishment." These errors might have misled potential clients, but they did not hold the same potential to harm the public as would operation of a funeral establishment in an unlicensed location.

20. For these reasons, the advertising violation standing alone does not show that

revocation of Respondent Cole's funeral director license is necessary to protect the public.

21. With respect to the ethics class, however, Respondent Cole's error was more serious because he was not honest with the Bureau in reporting his compliance with his probation. In addition, his decision to disregard the Bureau's order until the eve of the hearing in this matter, as set forth in Findings 21 through 27, demonstrates a careless and contemptuous attitude toward the Bureau's regulatory authority. Respondents' original violations that led to the discipline of both licenses in 2014 demonstrate a disrespect for the Act and the rules and regulations that govern funeral establishments. The nature and extent of Respondents' current violations of probation continue to reflect that disrespect and a disregard for the Department's disciplinary decision. Respondent Cole was also dismissive of these violations and characterized them as "honest mistakes." Such conduct raises concerns regarding Respondents' ability to deal honestly with the Bureau and follow the laws and regulations applicable to these licenses.

22. However, the head injury Respondent suffered in late 2014, as described in Finding 28, was considered in lessening the penalty somewhat, as does Respondent's decision (described in Finding 30) to seek help managing the administrative aspects of his business. Further, and as set forth in Findings 29 and 31, Respondent has worked in the funeral services business for many years without any other serious incidents.

23. Considering all these factors, revocation of Respondent Cole's funeral director license would penalize him without offering significant protection to the public against dangerous or unethical business practices. A two-year extension to Respondent Cole's probation will give Respondent Cole a final opportunity to demonstrate to the Bureau that he can comply with all regulatory requirements under the Cemetery and Funeral Act and allow the Bureau a sufficient amount of time to monitor Respondent Cole's efforts. With respect to Funeral Establishment License No. FD 2078, since the license has been cancelled and Respondent Cole has not indicated an interest or willingness in the past to comply with the probationary requirements for that establishment, the only appropriate penalty to be applied would be revocation.

24. By reason of the matters set forth in Finding 26, Respondent Cole need not be ordered again to complete a course in ethics.

Cost Recovery

25. A licensee found to have committed a violation of the licensing act may be required to pay the Bureau the reasonable costs of the investigation and enforcement of the case. (Bus. & Prof. Code, § 125.3.)

In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth the standards by which a licensing board must exercise its discretion to reduce or eliminate cost awards to ensure that the board does not deter licensees with potentially meritorious claims from exercising their administrative hearing rights. The court held that a licensing board requesting reimbursement for costs relating to a hearing must consider

the licensee's "subjective good faith belief in the merits of his position and whether the licensee has raised a "colorable challenge" to the proposed discipline. (*Id.* At 45.) The board also must consider whether the licensee will be "financially able to make later payments." (*Ibid.*) Lastly, the board may not assess full costs of investigation and enforcement when it has conducted a "disproportionately large investigation." (*Ibid.*)

All these matters have been considered. The Administrative Law Judge in this case determined that assessment against Respondent Cole of the Bureau's reasonable enforcement costs of \$3,300, as set forth in Finding 32, will reimburse the Bureau fairly without unduly burdening Respondent's exercise of his hearing rights.

ORDER

Accusation

1. The Accusation against Funeral Establishment License No. FD 2078, held by Respondent Royal Memories Inc., and against Funeral Director License No. FDR 2589, held by Respondent Harold Dwight Cole, is sustained.

Petition to Revoke Probation-Funeral Establishment License No. FD 2078

2. The Petition to Revoke Probation with respect to Funeral Establishment License No. FD 2078 is granted and the probation and the license is revoked.

Petition to Revoke Probation-Funeral Director License No. FD 2589

3. The Petition to Revoke Probation with respect to Funeral Director License No. FDR 2589 is granted. The probation previously granted to Harold Dwight Cole for Funeral Director License No. FDR 2589 is terminated. It is further ordered that Funeral Director License No. FDR 2589 issued to Harold Dwight Cole is revoked. However, the revocation is stayed and Respondent Cole is placed on probation for two (2) years on the following terms and conditions:

A. OBEY ALL LAWS

Respondent Harold Dwight Cole shall comply with all conditions of probation and obey all federal, state, and local laws, and all rules and regulations governing the programs regulated by the department.

B. QUARTERLY REPORTS

Respondent Harold Dwight Cole shall submit quarterly declarations under penalty of perjury, in a format designated by the department, stating whether or not respondent has been in compliance with all the conditions of probation. Respondent Harold Dwight Cole shall also submit such additional written reports and verifications of actions requested by the

department. Should the final probation report not be made as directed, the period of probation shall be extended until such time as the final report is made.

C. INTERVIEW WITH DEPARTMENT REPRESENTATIVE

As necessary, respondent Harold Dwight Cole shall appear in person for scheduled interviews with the Director or other designated representative for the purpose of monitoring compliance with the terms of this decision.

D. OUT-OF-STATE RESIDENCE OR OPERATION

Should respondent Harold Dwight Cole leave California to reside or operate outside this state, respondent must notify the department in writing of the dates of departure and return. Reporting in person may be waived if the respondent moves out of state. However, respondent Harold Dwight Cole shall continue compliance with other terms of probation to retain California licensure. Periods of residency, business operation, or employment outside California shall not reduce the probationary period.

E. COMPLETION OF PROBATION

Upon successful completion of probation, respondent Harold Dwight Cole's license will be fully restored.

F. VIOLATION OF PROBATION

Should respondent Harold Dwight Cole violate probation in any respect, the Director of the department, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation or Petition to Revoke Probation is filed against respondent Harold Dwight Cole during probation, the department shall have continuing jurisdiction until the matter is final, and the probation shall be extended until the matter is final.

G. LICENSE ISSUED DURING PROBATION

Any license or registration issued to respondent Harold Dwight Cole by the department during the period of probation shall be issued as a probationary license or registration and is subject to all the terms and conditions set forth herein. Respondent Harold Dwight Cole must comply with terms and conditions herein and demonstrate no cause for disciplinary action or denial of an application.

H. EVIDENCE OF KNOWLEDGE

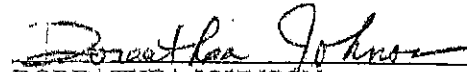
Respondent Harold Dwight Cole shall provide evidence satisfactory to the department that the licensee and all employees are knowledgeable in the laws and regulations governing the funeral industry, if deemed necessary by the Bureau Chief or department director.

I. COST RECOVERY

Respondent Harold Dwight Cole shall reimburse the Bureau \$3,300 for its actual and reasonable costs of investigation and enforcement of this matter. Within 30 days after the effective date of this Order, respondent either may pay this full sum to the Bureau or may enter into an agreement with the Bureau to pay the costs on a schedule acceptable to the Bureau. Probation shall not terminate for Funeral Director License No. FDR 2589 until full payment has been made. Funeral Director License No. FDR 2589 will not be renewed unless and until cost recovery is complete, or unless and until respondent is in compliance with a payment plan approved by the Bureau.

This Decision shall become effective on MARCH 23, 2017

IT IS SO ORDERED this 23 day of February, 2017.


DOREATHEA JOHNSON
Deputy Director, Legal Affairs
Department of Consumer Affairs